Not To Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

KATHRYN G. BUNDA, Plaintiff, vs. JOHN E. POTTER, Individually and in his Official Position as Postmaster General, Defendant.	No. C03-3102-MWB **ORDER REGARDING DEFENDANT'S BILL OF COSTS**

This matter comes before the court pursuant to the defendant's Amended Bill Of Costs (Doc. No. 88) and the plaintiff's opposition thereto (Doc. No. 90). The defendant seeks reimbursement for certain litigation expenses pursuant to Rule 54(d) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1920. The plaintiff objects to the

nature of some of the costs delineated by the defendant, arguing that certain items are not authorized or do not meet the requirements for award under the relevant statutes and rules.

I. INTRODUCTION AND BACKGROUND

On December 23, 2003, plaintiff Kathryn Bunda filed a complaint against defendant United States Postal Service averring claims of sexual harassment and retaliation (Doc. No. 1). A jury trial commenced on November 7, 2005. On November 11, 2005, the jury returned a verdict in favor of the defendant on all of the submitted claims (Doc. No. 78). Specifically, the jury determined the defendant had proved by a greater weight of the evidence that Bunda's hostile environment sexual harassment was time-barred. With respect to Bunda's claim of retaliation, the jury found Bunda failed to prove the elements of her claim by the greater weight of the evidence. On November 14, 2005, judgment was entered by the clerk of court reflecting the jury verdict and ordering that the plaintiff take nothing from the defendant (Doc. No. 79).

Following the entry of judgment, on November 18, 2005, the defendant, as the prevailing party, filed a Bill Of Costs seeking an award of $6,777.87 (Doc. No. 81). The plaintiff filed objections to the defendant's requested costs on November 22, 2005 (Doc. No. 82). Thereafter, on November 30, 2005, the defendant filed its reply to the plaintiff's objections (Doc. No. 84). On that same date, the defendant further sought leave to file an amended bill of costs because the cost of the plaintiff's deposition had inadvertently been omitted from its original request (Doc. No. 85). On December 8, 2005, this court granted the defendant leave to file an amended bill of costs (Doc. No. 87). The defendant's Amended Bill Of Costs was filed on that same day (Doc. No. 88). With the inclusion of the plaintiff's deposition costs, the total amount requested by the defendant is $6,997.92. Specifically, the breakdown of the costs and expenses for which the defendant seeks

reimbursement is as follows:

Description	Claimed Cost
Fees for Service of Summons and Subpoena (Webster County Sheriff, Scott Count Sheriff, and Polk County Sheriff)	$619.00
Fees of the Court Reporter	$1938.15 (including deposition of Bunda)
Fees for Deposition Witnesses	$4,120.00
Webster County Clerk of Court Copies of Documents	$30.17
Copies of Exhibits Used in Trial	$290.60
TOTAL	**$6,997.92**

The defendant asserts the delineated items are properly taxable against the plaintiff as "costs," within the meaning of Rule 54(d) and 28 U.S.C. § 1920.

On January 13, 2006, the plaintiff filed renewed objections to the Amended Bill Of Costs (Doc. No. 90). The plaintiff objects to the nature of the defendant's costs, asserting that the defendant should be denied all costs, with the exception of the amount requested for the plaintiff's deposition. More specifically, the plaintiff first contends the defendant cannot recover fees for service of summons and subpoenas because service was not provided by the U.S. Marshals Service. Next, the plaintiff argues that certain fees of the court reporter for depositions are not recoverable because the costs were not necessarily obtained for use in the case. In addition, the plaintiff argues that the defendant should not be entitled to recover the costs associated with obtaining duplicate copies of two

deposition transcripts. The plaintiff also asserts the defendant is not entitled to recover fees for the deposition of expert witnesses because the appearance of such witnesses was not necessarily obtained for use in the case. Finally, the plaintiff argues the fees of the Webster County Clerk of Court should be denied because the copies obtained, Bunda's divorce file, were not used at the time of trial. Neither party has requested oral argument in this matter. Therefore, the matter is fully submitted on the parties' written submissions and is ready for a determination by this court.

II. LEGAL ANALYSIS

A prevailing civil litigant is entitled to recover from the losing party the costs incurred as a result of the litigation in federal court. Pursuant to Federal Rule of Civil Procedure 54(d)(1), "costs other than attorney's fees shall be allowed as of course to the prevailing party unless the court otherwise directs. . . ." *Fed. R. Civ. P.* 54(d)(1). The costs recoverable under Rule 54(d)(1) are enumerated in 28 U.S.C. § 1920. The following are recoverable costs:

> (1) Fees of the clerk and marshal;
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
> (5) Docket fees under section 1923 of this title;
> (6) Compensation of court appointed experts. . . .

28 U.S.C. § 1920. The Court has "substantial discretion in awarding costs to a prevailing party under 28 U.S.C. § 1920 … and [Rule] 54(d)." *Richmond v. Southwire Co.*, 980 F.2d 518, 520 (8th Cir. 1992). "When an expense is taxable as a cost. . . there is a strong presumption that a prevailing party shall recover it 'in full measure.'" *Concord Boat Corp.*

v. Brunswick Corp., 309 F.3d 494, 498 (8th Cir. 2002) (quoting *In re Paoli R.R. Yard PCB Litig.*, 221 F.3d 449, 462, 468 (3d Cir. 2000) and citing *Zotos v. Lindbergh Sch. Dist.*, 121 F.3d 356, 363 (8th Cir. 1997)). "The 'losing party bears the burden of making the showing that an award is inequitable under the circumstances.'" *Id.* (quoting *In re Paoli*, 221 F.3d at 462-63). Keeping these principles in mind, the court will now turn to a detailed examination of the defendant's request for taxation of costs against the plaintiff.

A. Process Server Fees

The defendant claims it is entitled to be reimbursed in the amount of $619.00 for expenses associated with the service of summons and subpoenas. The plaintiff admits that various county sheriffs' offices effectuated the service of subpoenas in this case. However, the plaintiff objects to these costs, asserting that the costs constitute special process fees, which are nonrecoverable expenses within the Eighth Circuit. The defendant asserts that local sheriffs' offices are routinely used to effectuate service of summonses and subpoenas and that, consequently, all of the defendant's fees in this category should be allowed. A discussion of 28 U.S.C. § 1920 and its interaction with the Federal Rules of Civil Procedure is essential to the proper resolution of this challenge.

Under the plain language of § 1920(1), fees for the service of subpoenas and summons are only recoverable when charged by a United States Marshal under 28 U.S.C. § 1921. This creates an unfortunate quandary for civil litigants because solvent civil litigants typically use special or private process servers other than the U.S. Marshal's Office. Indeed, the Federal Rules of Civil Procedure operate to effectively preclude the involvement of the U.S. Marshal's Office in civil lawsuits, reserving their services for very limited circumstances. The tension between the Federal Rules of Civil Procedure and § 1920 resulted, in part, because Rule 4 was amended in 1983 in order to curtail the

marshal's duties with respect to service of the complaint and summons. Rule 4 was again amended in 1993 and now provides as follows:

> Service may be effected by any person who is not a party and who is at least 18 years of age. At the request of the plaintiff, however, the court may direct that service be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose. Such an appointment must be made when the plaintiff is authorized to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 or is authorized to proceed as a seaman under 28 U.S.C. § 1916.

Fed. R. Civ. P. 4. Rule 45(b) which deals with trial subpoenas, was similarly amended in 1991 to mirror the changes promulgated in Rule 4 and now states that a "subpoena may be served by any person who is not a party and is not less than 18 years of age." Thus, the U.S. Marshals' once prominent role in service has now been effectively limited to admiralty suits and "[p]rocess other than a summons provided in Rule 4 or subpoena as provided in Rule 45 . . . ." *Fed. R. Civ. P.* 4.1(a). In light of this patent ambiguity, the federal courts have arrived at varying outcomes. Myriad courts have held that, in light of the unambiguous statutory language, when the marshal no longer serves process, § 1920(1) no longer allows the recovery of such costs by a prevailing party. *See United States ex. rel. Evergreen Pipeline Constr. Co. v. Merritt Meridian Constr. Corp.*, 95 F.3d 153, 172 (2d Cir. 1996)) (holding that plain language of § 1920 does not allow taxing as costs private process fees), *Crues v. KFC Corp.*, 768 F.2d 230, 234 (8th Cir. 1985) (same); *Cofield v. Crumpler*, 179 F.R.D. 510, 514-16 (E.D. Va. 1998) (same); *Pion v. Liberty Dairy Co.*, 922 F. Supp. 48, 53 (W.D. Mich.1996) (same); *Chen v. Slattery*, 842 F. Supp. 597, 600 & N.4 (D.D.C. 1994); *Goldstein v. GNOC, Corp.*, No. 90-0496, 1994 WL 456360, at *203 (E.D. Pa. Aug. 22, 1994) (same); *Desisto Coll., Inc. v. Town of Howey-*

in-the-Hills, 718 F. Supp. 906, 913 (M.D. Fla. 1989) (same); *Zdunek v. Wash. Metro. Area Transit Authority*, 100 F.R.D. 689, 692 (D.D.C. 1983) (same); *see also In re D & B Countryside, L.L.C.*, 217 B.R. 72, 77 (Bankr. E.D. Va. 1998). In contrast, other courts have disagreed and arrived at the opposite conclusion—namely that since the U.S. Marshals Service is no longer involved as often in the serving of summonses and subpoenas, the cost of private process servers should be taxable under 28 U.S.C. § 1920(1). *See Alflex Corp. v. Underwriters Labs., Inc.*, 914 F.2d 175 (9th Cir. 1990); *Sullivan v. Chrysler Motors Corp.*, No. 94-5016, 1997 WL 94236, at *6 n.5 (D.N.J. Feb. 28, 1997) (same); *see also In re Howard*, No. 89-4-3543-PM, Adv. No. 90A-0089-PM, 1991 WL 79915, at *2 (Bankr. D. Md. May 2, 1991) (same). Yet other courts, understandably frustrated with either bright line outcome, have determined that § 1920(1) should be construed as permitting costs for private process servers, but only as *measured by* the Marshal's fees, regardless of whether the prevailing party actually utilized the Marshal. *See Collins v. Gorman*, 96 F.3d 1057, 1060 (7th Cir. 1996); *Griffith v. Mt. Carmel Med. Ctr.*, 157 F.R.D. 499, 507-08 (D. Kan. 1994). Thus, these courts allow fees to be taxed regardless of what entity provided the service, but only to the extent that the party would have recovered had a U.S. Marshal effectuated service. The courts that permit a prevailing party to recover special process fees generally employ the same reasoning for allowing such fees and disagree only as to the extent of the fees allowed to be recovered. The Ninth Circuit Court of Appeals's opinion in *Alflex Corp. v. Underwriters Labs, Inc.* provides a summary of the logic that underlies the conclusion that special process fees are recoverable under § 1920:

> In making Marshal's fees taxable as costs in section 1920(1), we believe Congress exhibited an intent to make service of process a taxable item. Since the enactment of section 1920(1), the method of serving civil summonses and subpoenas

> has changed. The U.S. Marshal no longer has that responsibility in most cases, but rather a private party must be employed as process server. Now that the Marshal is no longer involved as often in the serving of summonses and subpoenas, the cost of private process servers should be taxable under 28 U.S.C. § 1920(1).

Alflex Corp., 914 F.2d at 178 (citations and footnotes omitted); *see Roberts v. Homelite Div. of Textron, Inc.*, 117 F.R.D. 637, 641 (N.D. Ind. 1987) ("Due to the substitution of private process servers for the U.S. Marshal Service in recent years, it is appropriate to allow private process fees as costs."); *see also McGuigan v. CAE Link Corp.*, 155 F.R.D. 31 (N.D.N.Y. 1994) (citing *Roberts*); *James v. Village of Plainfield*, No. 92 C 6442, 1994 WL 148673, at *2 (N.D. Ill. Apr. 19, 1994) (citing *Alflex*); *Riofrio Anda v. Ralston Purina Co.*, 772 F. Supp. 46, 55 (D.P.R. 1991) (expressly disagreeing with contrary authority and adhering to *Roberts*); *Card v. State Farm Fire & Cas. Co.*, 126 F.R.D. 658, 662 (N.D. Miss.1989) ("The expense of serving subpoenas upon witnesses is a recoverable cost."). Thus, these courts, although appearing to disregard the plain language of the statute, do so based on the premise that Congress intended to make the costs of service of process taxable generally. *See generally id.*

Unfortunately for the defendant, while other courts have permitted the recovery of special process fees, this court is compelled to follow Eighth Circuit precedent regardless of the equities at play in the facts of this case. *See Crues*, 768 F.2d at 234. In *Crues*, the clerk awarded KFC, the prevailing party, costs in the amount requested even though Crues, the losing party, did not have an opportunity to object to KFC's filing. *Id.* Thus, the Eighth Circuit reversed the taxing of costs and remanded to the district court. *Id.* However, the Eighth Circuit instructed the district court to deny specific costs on remand, one of those being the fees requested for use of a special process server. *Id.* The Eighth

Circuit unequivocally stated : "Nor can [the prevailing party] recover $250 for use of a special process server, because 28 U.S.C. § 1920 (1982) contains no provision for such expenses." *Id.* In making this assertion, the Eighth Circuit cited to *Zdunek v. Washington Metropolitan Area Transit Authority*, 100 F.R.D. at 692. *Zdunek* construed the scope § 1920 as follows:

> While 28 U.S.C. § 1920(1) authorizes taxation of the service fees charged by the United States Marshals Service, there is no statutory authorization for awarding the fees of special process servers, as costs. Rules 4(c), 45 and Local Rule 1-10(a), which enable individuals other than U.S. Marshals to make service of process do not require that professional process servers be employed. Moreover, there was nothing exceptional about either the parities or the nature of this case that required the use of paid process servers. Consequently, the special process fees are not taxable as costs.

Id. The Eighth Circuit further cited to 10 C. Wright, A. Miller, & M. Kane, *Federal Practice & Procedure* § 2677, at 371-72 (1983), which indicates that taxation is "usually denied" for "costs, other than [M]arshal's fees, involved in serving a summons." *See Crues*, 768 F.2d at 234 (citing 10 C. Wright, A. Miller, & M. Kane, *Federal Practice & Procedure* § 2677, at 371-72 (1983)). Thus, it is clear to this court, based on the language utilized in *Crues* and the cases cited therein, that the Eighth Circuit does not allow recovery of costs incurred as the result of the employment of special process servers, other than the U.S. Marshals Service. *See id.*; *see also Goss Int'l Corp. v. Tokyo Kikai Seisakusho, Ltd.*, No. C00-35 LRR, 2004 WL 1234130, at *8 (N.D. Iowa June 2, 2004) (denying special process fees in light of the Eighth Circuit's decision in *Crues*).

A colorable argument may be advanced that the *Crues* decision is not controlling because the role of the federal marshal in civil lawsuits became further diminished after the Eighth Circuit rendered that decision. However, even if *Crues* can be distinguished

on that ground, this court's conclusion would remain unaltered under the facts of this case. This court has, on numerous occasions, pointed out that the first approach to statutory interpretation is the "plain language" of the statute in question. *See, e.g., Kinkaid v. John Morrell & Co.*, 321 F. Supp. 2d 1090, 1103 n.3 (N.D. Iowa 2004) (citing such reiterations). The Supreme Court describes this rule as the "one, cardinal canon before all others." *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253 (1992). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Id.* (citing *United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 241-42 (1989); *United States v. Goldenberg,* 168 U.S. 95, 102-03 (1897); *Oneale v. Thornton,* 10 U.S. (6 Cranch) 53 (1810)). When the language of the statute is plain, the inquiry also ends with the language of the statute, for in such instances "the sole function of the courts is to enforce [the statute] according to its terms." *Ron Pair Enters. Inc.*, 489 U.S. at 241 (quoting *Caminetti v. United States,* 242 U.S. 470, 485 (1917)). This "plain language" or "plain meaning" rule of interpretation is not limited to the meaning of individual terms; rather, "[s]uch an inquiry requires examining the text of the statute as a whole by considering its context, 'object, and policy.'" *Harmon Indus., Inc. v. Browner,* 191 F.3d 894, 899 (8th Cir. 1999) (quoting *Pelofsky v. Wallace,* 102 F.3d 350, 353 (8th Cir. 1996)). Thus, this court must "effectuate the intent reflected in the language of the enactment and the legislative process," *Colorado v. Idarado Mining Co.,* 916 F.2d 1486, 1494 (10th Cir. 1990), and it is not required to "produce a result demonstrably at odds with the intentions of [the statute's] drafters." *Ron Pair Enters., Inc.*, 489 U.S. at 242 (internal quotation marks omitted). In the case of 28 U.S.C. § 1920, subsection one is clear on its face. Neither the text of subsection one, nor an examination of the statute as a whole, suggests or even remotely implies that Congress intended to allow the recovery of fees for service of process under any and all circumstances. If that were the case, the

drafters would not have needed to specifically identify fees *of the marshal*, but rather, could have generally included fees for service of process. However, the drafters took the time to specify that only fees of the marshal and clerk are recoverable, indicating to this court an intent to limit the applicability of this section. *See* 28 U.S.C. § 1920(1).

Additionally, to extrapolate that a party may recover special process fees, in complete disregard to the unambiguous statutory text, would directly contradict the Supreme Court's holding in *West Virginia University Hospitals., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991). There, the plaintiff advanced an argument that in interpreting a statute, in that case the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, congressional purpose must prevail over the ordinary meaning of the plain language of the statutory text. *Id.* at 98. The Supreme Court flatly rejected such a contention. The Court held that where a statute contains a phrase that is unambiguous, "we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." *Id.* at 98-99 (citing *Ron Pair Enters. Inc.*, 489 U.S. at 241).

This conclusion is further bolstered by the logic and analysis employed by the Supreme Court in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987). There, the court stated that the discretion granted to district courts in Rule 54(d) of the Federal Rules of Civil Procedure to award costs other than attorney fees is not unfettered. *Id.* Therefore, the Court indicated that district courts, under Rule 54(d), do not have the authority to ignore or undermine a specific congressional command. *Id.* "Rather, it is solely a power to *decline* to tax, as costs, the items enumerated in § 1920." *Id.* (emphasis added). In light of the foregoing, it would be inappropriate for this court to do violence to the unambiguous language chosen by Congress simply because it is now of limited applicability. If the statute is out of date or contrary to Congress's intent, it is within the province of the legislature, not the judiciary, to amend the statute. Accordingly, based on

these principles and the Eighth Circuit's decision in *Crues*, the court declines to award to the defendant any amounts incurred for service of summons and subpoenas.

B. Fees Of The Court Reporter

"Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case" are recoverable under subsection two of § 1920. *See* 28 U.S.C. § 1920(2). The fees incurred as a result of deposition transcript costs may be awarded if "the deposition 'was necessarily obtained for use in a case' and was not 'purely investigative.'" *Zotos*, 121 F.3d at 363 (quoting *Slagenweit v. Slagenweit*, 63 F.3d 719, 720 (8th Cir. 1995)). Notably, the determination of necessity "'must be made in light of the facts known at the time of the deposition without regard to intervening developments that later render the deposition unneeded for further use.'" *Id.* (quoting *Barber v. Ruth*, 7 F.3d 636, 645 (7th Cir. 1993)). Thus, the underlying question is "'whether the depositions reasonably seemed necessary at the time they were taken.'" *Id.* (quoting *Manildra Milling Corp. v. Ogilvie Mills, Inc.*, 76 F.3d 1178, 1184 (Fed. Cir. 1996)).

The defendant seeks an award of the costs it incurred for fees of court reporters for depositions and transcripts of such depositions. Specifically, in its Amended Bill of Costs, the defendant seeks $1,718.10 for court reporter fees and transcripts with respect to various deponents. The plaintiff argues that many of the transcripts were not "necessarily obtained for use in the case," because some of the deponents were neither called as witnesses, nor were their deposition transcripts employed throughout the course of the trial on the merits of this matter. Unfortunately, the plaintiff's argument misses the point. The plaintiff correctly points out that "the most direct evidence of necessity is the actual use of a transcript in a court proceeding." *Ryther v. KARE 11*, 864 F. Supp. 1525, 1534 (D. Minn. 1994). However, contrary to the plaintiff's assertions, that is not the end of the

analysis. The plaintiff's argument incorrectly assumes a transcript not used during the course of the court proceedings must have been obtained purely for investigative purposes and therefore, cannot meet the test of necessity. This is an incorrect presumption. Although assessing necessity in cases where the transcript is not utilized in a court proceeding may be more rigorous, "the costs of a such a transcript may still be taxable when the deposition appeared reasonably necessary to the parties at the time it was taken." *Id.* (citing *Raio v. Am. Airlines, Inc.*, 102 F.R.D. 608, 611 (E.D. Pa. 1984); Wright, Miller & Kane, *Federal Practice & Procedure* § 2676 at 341)). Only depositions that "merely assist discovery or are investigatory in nature" are generally not taxable. *Id.* The *Guidelines on Taxation of Costs by the Clerk of Court* published by the Northern District of Iowa provide the following guidance with respect to deposition costs claimed within this district:

> The general rule is that the costs incurred in taking depositions will be taxed in favor of the prevailing party if the taking of the depositions was reasonably necessary at the time it was taken, *even though they may not have been used at trial*. Absent introduction into evidence of the deposition, a showing by the prevailing party that the deposition was relied upon for cross-examination or impeachment purposes, or *a showing that the deposition was useful, "in assisting a resolution of the contested issues,"* the costs incurred will normally not be allowed unless the prevailing party furnishes evidence that the deposition was reasonably necessary to the development of the case at the time the deposition was taken. The burden is on the party seeking costs to make this showing. This burden, however, must be balanced against the, "heavy presumption favoring an award of costs to the prevailing party."

United States District Court for the Northern District of Iowa, Guidelines on Taxation of Costs by the Clerk of Court 4-5 (January 2001) (unpublished manuscript, on file with the

Northern District of Iowa) [hereinafter "Guidelines"] (emphasis added). Upon a thorough review of the documentation provided to the court by both of the parties, it is apparent that all of the depositions, with the exception of the deposition of Caryl Fuoss, either assisted in a resolution of the contested issues in the case or were reasonably necessary to the development of the case at the time the deposition was taken. However, with respect to deponent Caryl Fuoss, the court finds the defendant has failed to demonstrate that the deposition was reasonably necessary to the development of the case at the time the deposition was taken. Accordingly, all costs associated with this witness are disallowed.

The plaintiff further challenges the defendant's request for the costs associated with obtaining an extra copy of certain transcripts. The plaintiff generally avers that "28 USC [sic] § 1920 does not allow for payment for duplicative costs," but fails to cite any case law in support of this sweeping assertion. Although the failure to include cite to the authorities upon which a party relies may result in waiver of the argument, *see, e.g.*, *Helm Fin. Corp. v. Iowa N. Ry. Co.*, 214 F. Supp. 2d 934, 1003 (N.D. Iowa 2002), the court will briefly address this argument in the interest of equity. Unfortunately for the plaintiff, her argument is foreclosed by the guidance set forth in the Guidelines. *See Guidelines*, at 5. The Guidelines specifically state that "[c]osts allowed for taxable depositions may include, among others, the stenographer's fee, *the cost of original transcript and one copy*, the fee and mileage allowance of witnesses, and costs of copies of papers obtained as exhibits in the deposition." *Id.* (emphasis added). Thus, the Guidelines specifically make provisions for the costs associated with the original transcript and one copy. Although the court is not required to award these costs, the court finds that in this case, it is equitable to do so. This is because it is clear the defendant only requested a minimal number of extra copies and only with respect to those deponents whose depositions were likely to be introduced at trial.

What is less lucid, however, is the amount the defendant is entitled to recover for these fees. The Guidelines, although making it clear a court can award these costs to a prevailing party, is silent on what amount is considered reasonable. Therefore, it appears the amount allotted for copies is within the sole discretion of the district court. Here, the defendant chose to obtain copies directly from the court reporter and was charged anywhere from $0.25 to $1.25 per page for copies. Such an amount, in the eyes of this court, is unreasonable because the defendant was not required to obtain copies from the court reporter and could have secured copies at a more reasonable fee from another source. Accordingly, although the defendant is entitled to reimbursement for copies, in its discretion, the court will only allow the defendant to recover costs at the more reasonable rate of $0.10 per page for the additional copy. The documentation provided by the defendant reflects, however, that with respect to certain witnesses, fees are sought for more than one copy of the transcript. Because the defendant is entitled to the costs associated with only one additional copy of the transcript pursuant to the Guidelines, any additional expenses, for example for reading and signing copies and services, are disallowed.

Although not challenged by the plaintiff, the defendant has also sought reimbursement for fees associated with obtaining an ASCII disk and postage fees. These fees are clearly disallowed by the Guidelines and the defendant is not entitled to recover these costs. *Id.* at 12. Therefore, the court concludes the defendant is entitled to $1359.40, rather than the requested amount of $1938.15, for court reporter fees and transcripts under 28 U.S.C. § 1920(2).

C. Fees For Expert Witnesses

The defendant requests in its Amended Bill Of Costs an award of $4,120.00 in

expert witness fees. Expenses for expert witnesses not appointed by the court are typically limited by the provisions set forth in 28 U.S.C. § 1821(a)(1), (b). Under § 1821, witness fees are limited to an attendance fee of $40.00, travel expenses and a subsistence allowance. 28 U.S.C. § 1821(a)(1), (b). Absent extraordinary circumstances or court authorization, no distinction is made between fact and expert witnesses. *See id.* Within the Eighth Circuit, however, additional expenses may be recovered, with respect to expert witnesses, when the expert's testimony was crucial to the resolution of the issues in the case, even if prior court approval was not obtained. *See Crues*, 768 F.2d at 234-35 (citing *Nemmers v. City of Dubuque*, 764 F.2d 502, 506 (8th Cir. 1985)).

The court has carefully scrutinized the itemized expert witness fees requested by the defendant and the corresponding receipt and billing documentation. All of the requested costs, with the exception of the costs associated with one nontestifying expert which will be discussed separately, were incurred as a result of deposing various expert witnesses. At the time the depositions were taken, the expert testimony solicited by the defendant with respect to these witnesses was crucial to the resolution of disputed issues that existed in the case. Accordingly, the defendant is entitled to these costs, in the full amount of $1,120.00.

With respect to the costs associated with the out-of-court preparation of various reports by a nontestifying medical expert, the plaintiff argues that this expert was neither deposed, nor called as a witness at trial, and that the costs should be disallowed as a result. The defendant argues that reports prepared by this expert were crucial to the resolution of a disputed issue in the case and were utilized in the defendant's motion for summary judgment. However, there is no federal authority that permits a prevailing party to recover fees charged for out-of-court preparation or by a nontestifying expert. *See Ryther*, 864 F. Supp at 1534 (concluding that a party may not recover fees for out-of-court-preparation

fees). Section 1920 is clear in its allowance of fees only for "*witnesses*." The statutory language, although it does encompass testifying experts, clearly does not extend to *all* experts. 28 U.S.C. § 1920(3). Accordingly, the court concludes the plaintiff should not be taxed $3000.00 for those costs associated with the defendant's nontestifying expert. Consequently, the court awards the defendant $1,120.00 in costs under 28 U.S.C. § 1920(3).

D. Other Costs

Finally, the defendant requests $320.77 in "other costs." Specifically, the defendant seeks to recover $30.17 for obtaining a copy of the plaintiff's divorce file from the Webster County Clerk of Court. Additionally, the defendant requests an award of $290.60 for the cost of reproducing its trial exhibits. 28 U.S.C. § 1920(4) allows fees for "exemplification and copies of papers necessarily obtained for use in the case." After a careful review of the itemized "other costs" requested by the defendant, the court concludes the fees requested by the defendant are reasonable and appropriate in this case. Accordingly, the court, in its discretion, awards to the defendant a total amount of $320.77 under 28 U.S.C. § 1920(4).

III. CONCLUSION

In light of the foregoing, the defendant's Amended Bill Of Costs is **granted** in part and **denied** in part as set forth herein. Accordingly, the court approves costs in the amount of **$2,800.17** to be taxed against the plaintiff as detailed below:

(1) Fees of the Court Reporter for transcripts necessarily obtained for use in this case—$1,359.40;

(2) Fees for witnesses—$1,120.00; and

(3) Other costs—$320.77.

IT IS SO ORDERED.

DATED this 31st day of January, 2006.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA